

The relationship between the nationality legislation of the Member States of the European Union and European citizenship

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CHAPTER VI

THE RELATIONSHIP BETWEEN THE NATIONALITY LEGISLATION OF THE MEMBER STATES OF THE EUROPEAN UNION AND EUROPEAN CITIZENSHIP*

Gerard-René de Groot

I. INTRODUCTORY REMARKS

Art. 8, para. 1 EC Treaty (as amended by the Treaty of Maastricht on the European Union¹) states:

Citizenship of the union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

Regarding this provision, one has to raise the twofold question, whether the European Union, by any means, can influence the grounds of acquisition and loss of the nationality of the Member States, respectively whether the legal order of the Union has already had some consequences for the content of the nationality laws of the Member States. This would not be surprising at all given the experiences in the past of political entities consisting of several states and where - like today in the European Union - the nationalities of the latter states served as ground for the acquisition of the status of 'citizen' of the newly created entity.

If one compares the development of the European Union at the end of the twentieth century in respect of the relationship of Union citizenship and the nationality of the Member States with the development of other Unions in the past, it is very likely that the Union will try to gain some power in shaping the nationality law of the Member States, because these nationalities entitle nationals of the various Member States to obtain Union citizenship and therefore all rights attached to this latter status.

To begin with, this chapter will describe the experiences of some other Unions in respect to the relationship between Union citizenship and 'nationality' of the Member States within these Unions (Part II). Then, in Part III, some impor-

* I am indebted to Mr. Luciano Milliard, who made very useful remarks on an earlier version of this contribution.

¹ *Official Journal* no. C 224, 31/08/92.

tant declarations on the relationship between the citizenship of the European Union and the Member States will be described and commented upon. It is argued that despite the fact that these Declarations underline the complete autonomy of Member States in nationality matters, some doubts can arise regarding possible limitations of the power of the Member States in this field. Part IV will cover the Declarations of two Member States regarding their nationality for Community purposes, whereas difficulties regarding the determination of the personal scope of European citizenship in respect of nationals of some other Member States are discussed. In this section, some examples are given of possible limitations of the autonomy of Member States in respect of the determination of their nationality for Community purposes. In Part V, some examples are examined of rules on the acquisition and loss of nationality which conflict with the principle of free movement of persons as guaranteed by the EC Treaty. It is argued that some of these rules violate European Community law.

II. EXPERIENCES IN OTHER UNIONS

A. UNITED STATES OF AMERICA²

More than two hundred years ago, directly after the War of Independence, the question was raised in the United States as to whether every state of the United States could grant the citizenship of the Union by naturalisation according to their own legislation or whether the Union had the right to enact uniform legislation on naturalisation. The question was finally decided by Art. I, sect. 8, clause 4 of the Constitution of the United States:³ 'The Congress shall have Power ... to establish a uniform Rule of Naturalization.' The right to enact rules dealing with naturalisation was given to the Union, because otherwise it would have been possible for the states of the Union to develop different policies on naturalisation and immigration. In the initial period of the United States (1776-1866) other rules on nationality law, especially rules regarding the acquisition by birth and regarding the loss of nationality were regulated by the different states and not by the Union. Only after the Fourteenth Amendment⁴ came into force did the entire matter of nationality become subject to federal legislation. Section 1 of the Fourteenth Amendment reads as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.'

² For an additional discussion of the developments in the United States, see V. Lippolis, *La cittadinanza europea*, Bologna: il Mulino (1994), pp. 75-85.

³ Constitution of 17 September 1787, in force on 1 July 1789.

⁴ Proposed by the 39th Congress on 16 June 1866, accepted on 28 July 1868.

B. THE GERMAN EMPIRE⁵

A slightly different, but comparable development can be observed in Germany during the second part of the nineteenth century. On the initiative of Prussia, the North-German Union was created in 1867. Art. 3 of the constitution of the Union gave a right of free movement in the territory of the Union to every citizen of a member state of the Union. Because the regulations regarding acquisition and loss of citizenship of the different member states varied considerably, the right to enact legislation in the field of citizenship was given to the Union. The necessary unification was realised by the enactment of the statute on the acquisition and loss of the federal and state nationality (*Gesetz über die Erwerbung und den Verlust der Bundes- und Staatsangehörigkeit*) of 1 June 1870;⁶ this statute entered into force on 1 January 1871 as a law of the North-German Union. Before the day of commencement, the German empire was created. The German empire was also a federation consisting of several member states. The statute on the federal and state citizenship was immediately copied by the German empire⁷ and came in force as an imperial statute (*Reichs- und Staatsangehörigkeitsgesetz*) on 1 January 1871.⁸ According to this statute, the federal nationality could exclusively be acquired through the acquisition of the nationality of a Member State of the German empire. In the case of loss of the citizenship of a Member State the federal nationality was lost as well.⁹

C. THE SWISS FEDERATION

A third example is Switzerland,¹⁰ which is also a federal state. The *Schweizer Bürgerrecht* (Swiss nationality) is acquired and lost as a consequence of the acquisition or loss of a *Kantonsbürgerrecht* (citizenship of a canton) and this *Kantonsbürgerrecht* is again linked to a *Gemeindebürgerrecht* (citizenship of a municipality). Generally speaking the cantons have the right to legislate, whereas the federation

⁵ For an additional discussion of the developments in Germany, see Rainer Hofmann, 'German Citizenship Law and European Citizenship: Towards a Special Kind of Dual Nationality?', in this volume.

⁶ *Bundesgesetzblatt (des Norddeutschen Bundes)* 1870, 335; in force on the 1st of January 1871, with exception of Bavaria (*Bayern*), where it came into force on 13 May 1871, *El-saß-Lothringen*, in force on 31 March 1873 and *Helgoland*, in force on 1 April 1891.

⁷ Protocol of Versailles of 15-11-1870, *Bundesgesetzblatt*, 1870, p. 650.

⁸ Some minor modifications were realized by § 9 of the statute of 22 April 1871, *Reichgesetzblatt*, 87 (revocation of § 1 para. 1, 8 para. 3 and 16).

⁹ 'Die Reichsangehörigkeit wird durch die Staatsangehörigkeit in einem Bundesstaat erworben und erlischt mit deren Verlust.'

¹⁰ For a discussion of the development of the relationship between Swiss federal nationality and the citizenship of a canton, see Gerard-René de Groot, 'De Zwitserse nationaliteit', in *CJHB (feestbundel Brunner)*, Deventer: Kluwer (1994), pp. 115-125; Vincenzo Lippolis, *op.cit.*, note 2, pp. 85-91.

(*Bund*) only has this right if the constitution grants it. According to the Constitution (*Bundesverfassung*) of 12 September 1848, the power to legislate in the field of nationality law was still mainly at the cantonal level. The cantons could enact regulations regarding the acquisition and loss of the nationality. Only the deprivation of nationality was forbidden by the constitution. The competence for legislation in the field of nationality changed when the constitution of 29 May 1874 came into force (and which is still in force, with some modifications). For the field of nationality law, Art. 44 *Bundesverfassung* ('BVerfG') has particular relevancy. In the original version of the 1874 Constitution, the first paragraph of this article stated that no canton could deprive a citizen of his citizenship. The second paragraph read:

Die Bedingungen für die Erteilung des Bürgerrechts an Ausländer, sowie diejenigen, unter welchen ein Schweizer zum Zwecke der Erwerbung eines ausländischen Bürgerrechts auf sein Bürgerrecht verzichten kann, werden durch die Bundesgesetzgebung geordnet.

Furthermore, Art. 54, para. 4 *BVerfG* stated that a foreign wife of a Swiss national acquired the *Bürgerrecht* (*Gemeindebürgerrecht*, therefore *Kantonsbürgerrecht* and finally, *Schweizer Bürgerrecht*) of her husband at the moment of their marriage.

Since 1874, the federation has therefore had the power to enact provisions regarding naturalisation and renunciation of nationality. Furthermore, the acquisition of nationality by way of marriage was regulated at the federal level. All other grounds for acquisition and loss of nationality with exception of 'deprivation' had to be regulated at the cantonal level.

After an unsuccessful attempt to modify Art. 44 *BVerfG* in 1922,¹¹ this article was finally modified in 1928.¹² The reason for this modification was an increase in the number of foreigners living in Switzerland. Art. 44 para. 1-4 *BVerfG* contains the following wording:

- (1) *Ein Schweizer Bürger darf weder aus der Schweiz noch aus seinem Heimatkanton ausgewiesen werden.*
- (2) *Die Bedingungen für die Erteilung und den Verlust des Schweizer Bürgerrechts werden durch die Bundesgesetzgebung aufgestellt.*
- (3) *Sie kann bestimmen, daß das Kind ausländischer Eltern von Geburt an Schweizer Bürger ist, wenn seine Mutter von Abstammung Schweizer Bürgerin war und die Eltern zur Zeit der Geburt in der Schweiz ihren Wohnsitz haben. Die Einbürgerung erfolgt in der früheren Heimatgemeinde der Mutter.*
- (4) *Die Bundesgesetzgebung stellt die Grundsätze für die Wiederaufnahme in das Bürgerrecht auf.*

¹¹ BBl. 1920 I, 515; IV 138; 1921 I 176; III 335; 1922 I 650, 654, 656, II 1, 871. Rejected by referendum of 11 June 1922.

¹² AS 44.724; BBl. 1920 V 1; 1922 III 661; 1927 II 269; 1928 I 77, 79, 81, II 153. Accepted by referendum of 20 May 1928.

As the result of this modification, the federation can exercise influence on each and every ground for acquisition and loss of Swiss nationality.¹³ The constitutional provisions on nationality were finally modified in 1983.¹⁴ Art. 44 *BVerfG* was totally revised and Art. 54, para. 4 *BVerfG* was revoked. Following this modification Art. 44 *BVerfG* reads:

- (1) *Der Bund regelt den Erwerb und den Verlust des Bürgerrechts durch Abstammung, Heirat und Adoption sowie den Verlust des Schweizer Bürgerrechts und die Wiedereinbürgerung.*
- (2) *Das Schweizer Bürgerrecht kann auch durch Einbürgerung in einen Kanton und eine Gemeinde erworben werden. Die Einbürgerung erfolgt durch die Kantone, nachdem der Bund die Einbürgerungsbewilligung erteilt hat. Der Bund erläßt Mindestvorschriften.*

The main goal of the modification of 1983 was the realisation of equal treatment of men and women in the field of nationality law, but at the same time, the power to legislate was again slightly moved from the cantonal level to the federation. The new version gives the right to legislate in this field to the federation, independent of the cantons in respect of the acquisition of nationality based on family relationships, as well as in respect of the loss of nationality and re-integration. With respect to naturalisation, the new article states clearly that the federation formulates the minimum conditions. Furthermore cantons can only naturalise a foreigner with previous consent of the federation. The power to naturalise is thus at the cantonal level, but the federation keeps an eye on the whole issue.

III. THE RELATIONSHIP BETWEEN EUROPEAN CITIZENSHIP AND NATIONALITIES OF THE MEMBER STATES

A. DECLARATIONS REGARDING THE RELATIONSHIP

In the three federations discussed above, the opinion finally accepted was that it would not be wise to grant total freedom of movement to all citizens of the member states without - at least a limited - federal influence on the regulations concerning the grounds of acquisition and loss of nationality. It is very unlikely that this conclusion will be substantially different with regard to the European Union: because the consequence of nationality of a Member State is the entitlement to the right of free establishment in other Member States and to several (other) benefits in those other Member States, all Member States (and therefore the Union) are very interested in the rules and policies regarding the grant and

¹³ It must be mentioned that the possibility created by the third paragraph to introduce an *ius sanguinis a matre* was finally utilized fifty years later, in 1978.

¹⁴ *Bundesbeschluss* of 24 June 1983, BBl. 1983 II 703. Accepted by referendum of 4 December 1983. See BBl. 1984 I 614.

loss of the nationality of their (fellow) Member States.

Nevertheless, at first sight one has to deny the presence of any influence of the European Union on the nationality legislation of the Member States. The Representatives of the governments of the Member States obviously discussed this problem, because they added a special 'Declaration (no. 2) on the Nationality of a Member State' to the Maastricht treaty. The Declaration states as follows:

The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a Declaration lodged with the Presidency and may amend any such Declaration when necessary.

Every Member State seems to be totally autonomous with regard to the regulation of the nationality of its own country. This is underlined as well in the Declaration of the Member States as a reaction to the unilateral Declarations of Denmark at the occasion of the Danish ratification of the Maastricht Treaty,¹⁵ because the first two paragraphs of the Danish Declaration address the relationship between Danish nationality and European citizenship:

Danish Declaration on Citizenship of the Union

1. Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-State. The question of Denmark participating in any such development does, therefore, not arise.
2. Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States.
3.; 4.

In reaction to this Danish statement, the Heads of State or Government¹⁶ in their European Council session of 11 and 12 December 1992 again emphasised the message of the Declaration on nationality attached to the Maastricht Treaty:

¹⁵ 'Unilateral Declarations of Denmark, to be associated with the Danish Act of Ratification of the Treaty on European Union' and of which the 11 other Member States take cognizance.

¹⁶ 'Decision of the heads of state or government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union'. See on this decision, D. Curtin and Van Ooik, 'Denmark and the Edinburgh Summit: Maas-

The provisions, of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.

Keeping in mind the Declaration on citizenship of the Union attached to the Treaty of Maastricht, the Danish Declaration is rather surprising. The autonomy of the Member States in nationality matters was obviously already recognised. There seemed to be no reason for Denmark to hesitate about this autonomy. However, it may be, that the Danish hesitations were caused by the Danish text of Art. 8. The Danish text reads as follows:

*Der indføres et unionsborgerskab. Unionsborgerskab har enhver, der er statsborger i en medlemsstat.*¹⁷

In most of the other Community languages, an obvious linguistic difference was made between the status, which indicated the 'membership' of a Member-State on one hand and the newly created European citizenship on the other hand. Compare the wording in English: 'nationality of a Member-State' versus 'citizenship of the Union'; in Netherlands: *nationaliteit* versus *burgerschap*; in French: *nationalité* versus *citoyenneté*; in German: *Staatsangehörigkeit* versus *Bürgerschaft*; and in Spanish: *nacionalidad* versus *ciudadanía*.

The double use of the word *borgerskab* was perhaps 'the oil on the fire' of the Danish fear that the creation of European citizenship could be the first step on the way to the decline of their own (Danish) nationality. I have discovered that the Italian text however, has the same feature as the Danish, using both times the same expression *cittadinanza*. Yet, similar hesitations were not expressed by Italian authorities or authors. But that can perhaps be explained by the different attitudes of Denmark and Italy with respect to drafts published by the European Commission. Denmark (like the United Kingdom) is always highly critical when it comes to details of the text of the drafts, whereas Italy tends to concentrate on the main lines of a proposal, without paying too much attention to the details.

tricht without Tears', in D. O'Keeffe and P.M. Twomey (eds.), *Legal Issues of the Maastricht Treaty*, London: Chancery Law Publishing (1994), pp. 349-365.

¹⁷ Citizenship of the union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.

B. DOUBTS REGARDING THE COMPLETE AUTONOMY OF MEMBER STATES IN THE FIELD OF NATIONALITY LAW

The opinion formulated in Declaration no 2, in the Danish Declaration, and in the reaction of the European Council is obvious: the national autonomy in nationality matters is not affected at all by the creation of a European citizenship. Nevertheless I have some doubts as to whether the first-sight conclusion that Member States are still completely autonomous can be maintained in all circumstances. In the first place we can observe, that the relation between the first and the second sentence of the (Maastricht) Declaration on nationality is not completely clear. The first sentence gives the right to each Member State to determine who is a national of its state: the nationality of a Member State shall be determined solely by reference to the national law of that Member State and not by reference to community law. But the second sentence gives a Member State the possibility to make an additional Declaration 'for information' regarding the determination of the persons who possess the nationality of that Member State.

Is the consequence of this second sentence that a Member State is able to exclude some groups of its nationals from the rights of the EC treaty? And can a Member State grant these rights to groups of individuals who do not possess the nationality of that Member State in the sense of the regular nationality legislation? Or is the Member State only able to give an authoritative explanation of its nationality laws, if reasonable doubts arise as to who exactly is a national of that Member State?

Of course, the other Member States need information about the question, for example, whether they should only consider as German nationals for community purposes those persons who possess German nationality in the sense of the German nationality act, or if Germans in the sense of Art. 116 of the German constitution fall within this 'privileged category' as well. And of course, the other Member States want to know whether a British overseas citizen is a British citizen for Community purposes. But would it be possible, that for example, for the Netherlands to make a Declaration that all Netherlands citizens born outside the territory of the Kingdom of the Netherlands are not Netherlands citizens for Community purposes?

In a reading of the Netherlands' law of citizenship, no reasonable doubt arises as to whether children of Netherlands citizens born abroad are Netherlands. These children acquire Netherlands citizenship by birth *iure sanguinis* and therefore, a contrary Declaration addressed to the Presidency of the European Community would be rather surprising. Would such a Declaration perhaps violate the aim of Art. 8 of the Treaty? The answer to this question depends - *inter alia* - on the interpretation of the second sentence of the Additional Declaration: does this grant total freedom to make any thinkable Declaration regarding the determination of the nationals of a Member State? And, what in particular is the aim of the words, 'for information' and 'when necessary' in that second sentence?

Doubts about the total freedom of the Member States arose as well after the *Micheletti* decision of the European Court of Justice of 7 July 1992.¹⁸ In this decision, the Court held,

La définition des conditions d'acquisition et de perte de la nationalité relève, conformément au droit international, de la compétence de chaque État membre, compétence qui doit être exercée dans le respect du droit communautaire.

States are autonomous regarding the regulation of their nationality, but have to respect international law. This is an old and generally accepted rule, already codified in Art. 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws of The Hague.¹⁹ But the essential question is why the *Micheletti* Court stressed the necessity of respect for community law. Until now, the European Union has not enacted any regulation or directive in the field of nationality law²⁰ and in view of the above-mentioned Declaration of the heads of government attached to the Maastricht Treaty and the Declaration of the European Council in December 1992, it is not very likely that a regulation or directive will be prepared in the near future.

It may be argued that the nationality legislation of a Member State could violate three general principles of community law:

- a) the obligation of solidarity (*Gemeinschaftstreue*; Art. 5 EC Treaty). A violation of this principle would be observed if a Member State granted its nationality to an important part of the population of a non-EU country, without any previous consultation with Brussels. The same would be the case if a Member State lodged a declaration regarding the determination of nationals for Community purposes, including in it a significant part of the population of a non-EU country, without previous consultation with Brussels. This view will be elaborated in Part IV, *infra*, especially Part IV.B. and Part IV.C.
- b) the right of free movement within the European Union. Such a violation could exist if the rules for loss or acquisition of the nationality conflict with the right of free movement of persons. Some examples of such rules will be examined in Part V.

¹⁸ Case 369/90, *Mario Vincente Micheletti and others v. Delegación del Gobierno en Cantabria*; Decision of 7 July 1992; *Jurisprudentie Hof van Justitie* 1992 I, 4239-4263.

¹⁹ 12-4-1930: *United Nations Treaty Service*, Vol. 179, 89. 'It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.'

²⁰ The only attempt to have some influence on nationality matters was a resolution of the European Parliament of 18 September 1981, *Official Journal* 1981 C 260/100, following a discussion regarding the British Nationality Act 1981, that a certain harmonization of nationality law should be promoted in order to avoid that persons could be born stateless on the territory of the Community.

- c) the rules regarding the acquisition or loss of the nationality of a Member State cannot violate public international law, especially fundamental rights guaranteed by international law.²¹ If an individual acquires the nationality of a Member State based on the application of a rule which violates international law, other Member States are entitled to treat the person involved as not possessing the nationality involved, and therefore as a non-EU citizen. This conclusion is in conformity with the general reaction regarding an attribution of a nationality under violation of international law.²² If one loses the nationality of a Member State because of the application of a rule which violates international law, the general accepted view is that the other Member States should not regard such a withdrawal of nationality as non-existent: if the Member States would do this, the international and national rules which aim to reduce cases of statelessness would not be activated.²³ In the framework of the European Union, another more effective attitude is indicated. Other Member States and the Union must treat the person involved as still possessing European citizenship.²⁴

Before examining the first two above-mentioned points some remarks should be made about the determination of the nationality of citizens of Member States for Community purposes.

IV. THE DETERMINATION OF NATIONALITY FOR COMMUNITY PURPOSES

A. THE DECLARATIONS OF GERMANY AND THE UNITED KINGDOM

Two Member States made special Declarations in response to the question of who must be considered as their nationals for Community purposes. Both Member States did not simply 'explain' their nationality legislation, but patently created a special, functional nationality for Community purposes. This observation is of importance for the interpretation of the words 'for information' in the

²¹ For a different view, see R. Kovar and D. Simon, 'La citoyenneté européenne', *Cahier de Droit européen* (1994), p. 291.

²² See Gerard René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln: Heymans (1979), pp. 17-23.

²³ *Ibid.*, p. 22.

²⁴ Compare as well, David O'Keeffe and Antonio Bavasso in their chapter in this volume, 'Fundamental rights and the European Union', where they underline that, once an individual has obtained the status of a European citizen, judicial supervision of the ECJ concerning depriving an individual of the nationality of a Member State is perfectly admissible in the light of the effects that this measure will produce on European citizenship rights. See also S. Hall, *Nationality, Migration Rights and Citizenship of the Union*, Dordrecht: Martinus Nijhoff (1995), pp. 9,10,99. I will not elaborate on this question in this chapter, but will devote a separate publication to this topic in the near future.

Declaration on nationality attached to the Maastricht Treaty. These words do not exclude the possibility that the determination of nationals for Community purposes deviates from the general definition of nationals.²⁵

As far back as 1957, Germany made a Declaration that not only Germans in the sense of the German nationality statute (the *Reichs- und Staatsangehörigkeitsgesetz* of 1913, as modified, which already included all nationals of the Democratic Republic of Germany), but also Germans in the sense of Art. 116 Constitution (*Grundgesetz*), which includes ethnic Germans in Eastern Europe, e.g., the so-called 'Wolga-Germans' are considered Germans for European Community purposes.²⁶

In 1973, at the occasion of the accession of the United Kingdom to the European Community, this new Member State made a Declaration on the interpretation of British nationals for Community purposes as well. This Declaration was revised following the enactment of the new British Nationality Act of 1981, which came into force on 1 January 1983. It is remarkable to observe that the redefinition of 'British for Community purposes' was a matter 'subject to discussions with the Community'.²⁷ Obviously, the government of the United Kingdom felt that it was not totally free regarding the determination of its nationals for EC purposes.

As a general rule, all British citizens in the sense of the new British Nationality Act are nationals for Community purposes, whereas the 'British Dependant Territories Citizen', 'British Overseas Citizens', 'British Subject without Citizenship' and 'British Protected Persons' are not. But to this general rule, some exceptions are made. Remarkable is the fact that British citizens residing on the Channel Islands or the Isle of Man are excluded from the right on free movement,²⁸ whereas British Dependant Territories Citizens residing in Gibraltar are included.²⁹ The inclusion of the Gibraltarians is an immediate consequence of

²⁵ See also Andrew Evans' chapter, 'Union Citizenship and the Constitutionalization of Equality in EU Law', with reference to Case T 230/94 *Frederick Farrugia v. EC Commission*.

²⁶ See 'Treaties establishing the European Communities', *Office for Official Publications of the European Communities* (1978), 573. Compare Albert Bleckmann, 'German Nationality Within the Meaning of the EEC Treaty', *Common Market Law Review* (1978), pp. 435-446, and also Albert Bleckmann and Ingo Erberich, in Bleckmann (ed.), *Europarecht*, 5th edition (1990), No. 2114.

²⁷ On this point see also: Evans, *op. cit.*, note 25, for further references.

²⁸ See in more detail Hall, *op. cit.*, note 24, p. 23.

²⁹ See *Official Journal* (1972) L 73/196; *Bundesgesetzblatt II*, 1410; on this declaration, A.C. Evans, 'Nationality Law and the Free Movement of Persons in the EEC, with Special reference to the British Nationality Act 1981', *Yearbook of European Law* (1982), 174-189; A.C. Evans, 'European Citizenship: a Novel Concept in EEC law', *American Journal of Comparative Law* (1984), pp. 679-715; P. Oliver, 'Non-community Nationals and the Treaty of Rome', *Yearbook of European Law* (1985), p. 60; R. Plender, 'An Incipient Form of European Citizenship', in F.G. Jacobs (ed.), *European Law and the Individual*, Amsterdam: North Holland Publishing Company (1976), pp. 42-45. Compare also

Art. 227, para 4, EC Treaty: 'The provisions of this Treaty shall apply to the European Territories for whose relations a Member State is responsible.'

Writing about the right of patriality³⁰ in the United Kingdom Laurie Fransman concluded, 'Thus, non-patrial Gibraltarians are only minimally removed from the scope of patriality, but acquire this advantage from Brussels, and not from Westminster'.³¹

The position of the Channel Islanders and the Manxmen (citizens on the Isle of Man) is complicated. Art. 2 of Protocol 3 of the 1972 Accession Treaty *does* exclude them from the right of free movement with the words '[They] shall not benefit from Community provisions relating to the free movement of persons and services'. But unlike e.g., the Faroe Islanders (see *infra*) these two groups are not completely deprived of their status as 'nationals of a Member State for Community purposes'.³² Art. 6 of Protocol 3 of the 1972 Accession Treaty defines the Channel Islanders and Manxmen as those persons who hold the citizenship of the United Kingdom and Colonies by virtue of having been born, adopted, naturalised or registered in one of the islands (or by virtue of one of their parents or grandparents having been born, adopted, naturalised or registered in one of the islands).

However, a Channel Islander or Manxman loses his exceptional status and gains the Community rights of a British national, 'if he has at any time been resident in the United Kingdom for five years'. Hall³³ urges that attention be paid to the position of a Channel Islander or Manxman who manages to live 'in any place other than the United Kingdom for more than five years, especially if that place is another Member State'. Hall concludes that it would be 'anomalous' if such a person 'does not lose his exceptional status and its attendant disability from access to the Treaty's economic migration rights'. I have to admit that I hesitate about this statement of Hall. It is an anomaly indeed, if for example, a Manxman who marries an Irish national and lives as a spouse of this Irish national in Ireland would not acquire an independent status as European citizen with free movement rights after a residence of at least five years in the territory of the Community. My hesitations are fed by the reference in Art. 6 of Protocol 3 to the situation of the British citizen born abroad, but registered as British be-

Command Paper 9062, published by Her Majesty's Stationery Office.

³⁰ '...free to live in, and to come and go into and from, the U.K. without let or hindrance, except such as may be required under and in accordance with this Act to enable their right to be established...' (Section 1, Subsection 1 Immigration Act 1971).

³¹ L. Fransman, *British Nationality Law and the 1981 Act*, London: Fourmat Publishing (1989), p. 23. According to Sect. 5 BNA 1981, Gibraltarians are able to acquire British citizenship by making a declaration of registration. Compare V. Bevan, *The Development of British Immigration Law*, London: Croom Helm (1986), pp. 127: 'a last-minute victory in the House of Lords'.

³² Hall, *op.cit.*, note 24, p. 23, therefore concludes, that they do benefit from the provisions of Art. 8b- 8e EC Treaty.

³³ Hall, *op.cit.*, note 24, p. 29, footnote 6.

cause of the links of their parents or *grandparents* with the Channel Islands or the Isle of Man. If a residence in a third country would be enough in order to acquire full rights of free movement as a European citizen, the reference to the grandparents seems to be at the least, superfluous.

The other Member States did not protest against the German and British unilateral Declarations and are therefore in my opinion, bound by these Declarations (compare Art. 20 para 5 of the Vienna Convention on Treaties). Any hesitation about the validity of these unilateral Declarations is moot after the Declaration on nationality attached to the Treaty of Maastricht, which makes it possible to lodge Declarations similar to those made by Germany and the United Kingdom to the Presidency and to amend such Declarations, as the United Kingdom did. The example of the Declaration of the United Kingdom demonstrates that a Member State is not completely free in the unilateral determination of its nationals for Community purposes. If the United Kingdom would like to make an amended Declaration excluding the Gibraltarians, such a Declaration would perhaps violate Art. 227, para. 4 EC Treaty.

Some other Treaty provisions have consequences for the personal scope of the Treaty, and therefore for European citizenship as well. Compare the special position of the Danish nationals living on the Faroe Islands and Greenland, who are not Danish nationals for Community purposes.³⁴ Compare as well the position of the Finnish nationals living on the Åland islands. Art. 227 (5)(a) EC Treaty (as amended in 1972, on the occasion of Denmark's accession to the Community) provided that the Treaty did not apply to the Faroe Islands, but that until the end of 1975, Denmark could make a Declaration that the Treaty applied to those islands. Denmark did not make such a Declaration and the territory of the Faroe Islands is now excluded. The Treaty of Maastricht amended Art. 227 (5)(a), which now states that the Treaty does not apply to the Faroe Islands. Art. 4 of Protocol 2 of the Accession Treaty of Denmark provided that, 'Danish nationals resident in the Faroe Islands shall be considered to be nationals of a Member State' from the date on which the Danish government made a positive Declaration on the applicability of the Treaty to the Faroe Islands. Because Denmark did not do so, the Danish nationals resident on the Faroe Islands are not European citizens, although they possess the same nationality as the Danish living in other parts of Denmark or any other part of the world.³⁵

With respect to Danish residents of Greenland, the situation is even more complicated.³⁶ In 1973 Greenland, together with metropolitan Denmark, became part of the European Community. In 1979, Greenland obtained the status of a self-governing community within Denmark.³⁷ In 1982, a referendum on Greenland's withdrawal from the Community was passed; this led to the 1985 'Green-

³⁴ See Hall, *op.cit.* note 24, pp.23-25.

³⁵ So Hall, *op.cit.*, note 24, p. 23.

³⁶ Hall, *op.cit.*, note 24, p.24.

³⁷ Act 577 of 29 November 1978.

land Treaty' amending the Treaties establishing the European Communities.³⁸ This treaty re-classified Greenland as an Overseas Territory. Therefore, the Greenlanders are now nationals of a Member State living in an Overseas Territory, which is not territory of the Union. With regard to the position of such nationals in respect to European citizenship, see Section C, *infra*.

B. A PROBLEM WITH RESPECT TO SPANISH NATIONALITY FOR COMMUNITY PURPOSES

It is remarkable that Spain did not make any Declaration in order to explain who is a Spanish citizen for Community purposes, nor does the Accession Treaty contain a provision which could help with the determination of Spanish nationals who are entitled to the benefits of the Community. Prior to the execution of the Accession Treaty, Spain had concluded several treaties on multiple citizenship with Latin American countries. Spaniards who acquire the nationality of those Latin American countries do not lose Spanish nationality, while the citizens of those Latin American countries can acquire Spanish citizenship without losing the Latin American nationality involved. These *Tratados de doble nacionalidad* constituted a problem that was discussed during the negotiations regarding the accession of Spain to the Community. This fact I conclude from a 1981 publication of Elisa Perez Vera;³⁹ she writes:

*es ... un aspecto del Derecho español de nacionalidad que parece despertar serias reservas en ciertos juristas comunitarios que abogarian por su modificacion.*⁴⁰

The goal of the publication of Elisa Perez Vera was to convince lawyers that the Spanish system of double citizenship did not constitute any danger for the other Member States of the Community. If a Spaniard acquires the nationality of a Latin American country which has concluded a *Tratado de doble nacionalidad* with Spain, he will not lose Spanish citizenship, but during the time he resides in a country outside Spain, he does not enjoy any right attached to Spanish citizenship. His Spanish nationality is *en hibernacion* (dormant) until he resides in Spain again. After having done that, his Spanish nationality awakens once more, including all the rights attached to this nationality (including - after the accession to the Community- the rights which Spaniards possess as European citizens). Obviously the Spanish government convinced Brussels with similar arguments, because Spain was not forced to make an explanatory Declaration on Spanish nationality which excluded Spaniards with a Latin American nationality from the benefits of the EC Treaty. Would Spain now be allowed to lodge a unilateral Dec-

³⁸ *Official Journal* (1985) L 29/1.

³⁹ 'El sistema español de doble nacionalidad ante la futura adhesion de España a las Comunidades Europeas', *Revista de instituciones europeas* (1981), pp. 685-703.

⁴⁰ *Ibid.*, p. 685.

laration on Spanish nationality to the Presidency of the Union including in the category 'Spanish for Community purposes' all double Spanish/Latin American citizens without any previous consultation of the European Commission? One could argue that such a Declaration would violate the obligation of solidarity (Art. 5 of the Treaty).

One should note however, that this violation may only apply to the first generation of Spaniards acquiring a Latin American nationality. This conclusion can be made from the *Micheletti* decision of the European Court of Justice: Italy and Argentina had concluded a treaty on double citizenship similar to treaties existing between Spain and several Latin American countries, *inter alia* Argentina. An Italian who acquired Argentinean citizenship did not lose Italian nationality, but could not exercise any right attached to this nationality until he resided in Italy again. Nevertheless, the Italian authorities concluded that the child (*in casu* Mario Vicente Micheletti) of an Italian national, who previously acquired Argentinean citizenship and who was born in Argentina, acquired *iure sanguinis* Italian nationality, without any restriction. In the opinion of the Italian authorities, the child could exercise all rights linked to Italian citizenship, including the rights derived from the EC Treaty such as the right of free movement within the European Union. It is not surprising that Spain was not amused with this unusual interpretation of the scope of the Italian-Argentinean treaty, as this interpretation differs considerably from the Spanish interpretation of its similar treaties with Latin American countries. Spain obviously applies the traditional principle *nemo plus iuris transferre potest quam ipse habet*.⁴¹ a Spaniard, who cannot exercise the rights normally attached to this citizenship until he resides in Spain, can only transfer this nationality *iure sanguinis* to his children under the same restriction. In the end, the European Court of Justice accepted the Italian interpretation of the Italian-Argentinean treaty, because this right of interpretation was a domestic matter and did not violate either international law or Community law. Because of this acceptance of the 'surprising' Italian interpretation, it would not constitute a violation of Art. 5 EC Treaty if Spain would suddenly lodge a Declaration containing a corresponding interpretation of the Spanish treaties on double nationality, even if Spain probably originally assured the negotiators of the Community that its interpretation of these treaties was different.

C. NATIONALS OF A MEMBER STATE LIVING IN NON-EU OVERSEAS TERRITORIES

A very special difficulty with respect to the determination of nationals of a Member State for Community purposes, is created by the nationals of a Member State living in non-European territories of those Member States when those terri-

⁴¹ (Also known as *nemo dat quod non habet*): No one can transfer more rights than he himself has.

territories are not recognised territories of the European Union. One example is the Netherlands nationals living in the Netherlands Antilles or Aruba. The Kingdom of the Netherlands consists of three territories: the European part of the Kingdom (commonly known as the Netherlands), the Netherlands Antilles and Aruba. Only the territory of the European part of the Kingdom belongs to the European Union; the territories of the Caribbean islands (Netherlands Antilles and Aruba) do not belong to the Union but are territories in the sense of Art. 227 para 3 EC Treaty.⁴² Each country within the Kingdom has its own constitution (*Grondwet van Nederland*, *Staatsregeling van de Nederlandse Antillen* and *Staatsregeling van Aruba*), to which the Charter of the Kingdom is superior (Art. 5 para 2 Charter). Art. 3, para 1, sub c of the Charter of the Kingdom states that the regulation of Netherlands nationality belongs to the legislative power of the Kingdom. The nationality of the Kingdom of the Netherlands is therefore regulated by the *Rijkswet* (a statute for the whole Kingdom of the Netherlands, including the Caribbean, non-EU territories). This Netherlands Nationality Act knows only one nationality status (*Nederlanderschap*) without making any distinction between those nationals who have a close connection with the Caribbean part of the Kingdom, and those who have an obvious link with the European part of the Netherlands. The question thus posed is, whether those Netherlands nationals who have an obvious close connection to the non-EU territories of the Kingdom of the Netherlands should enjoy the benefits guaranteed by the EC Treaty, or, in other words: are these Netherlands nationals European citizens or not?

In the opinion of Mortelmans and Temmink (in a publication in the *Tijdschrift voor Antilliaans Recht (TAR) Justicia*)⁴³ Netherlands nationals with a close link to the Netherlands Antilles and Aruba do not enjoy the right of free movement guaranteed by the EC Treaty.⁴⁴ Mortelmans and Temmink emphasise that Art. 135 EC Treaty prescribes that the freedom of movement within the Member States for workers from the non-European countries and territories of the Member States shall be governed by agreements to be concluded with the

⁴² This position differs from that of the neighboring islands St. Martin and Guadeloupe, which have the status of French *département d'outre-mer* to which Art. 227 para 2 EC-Treaty is applicable.

⁴³ K.J.M. Mortelmans and H.A.G. Temmink, 'Het vrije personenverkeer tussen de Nederlandse Antillen en Aruba en de Europese Gemeenschap', in *Met het oog op Europa; De Europese Gemeenschap, De Nederlandse Antillen en Aruba, Uitgave van de Stichting Tijdschrift voor Antilliaans Recht* Willemstad, the Netherlands: Justicia (November 1991), pp.51-91, especially p. 63, 64. Hall, *op. cit.*, pp. 25-30, comes to the same conclusion.

⁴⁴ Compare as well the publications of J.M. Burgers-Vos, 'Europa '92 en het vrije verkeer van werknemers (Een studie naar de regeling van het vrije werknemersverkeer in EEG-verband, de positie van de Nederlandse Antillen en de gevolgen van Europese wetgeving terzake voor de Nederlandse Antillen)', *TAR Justicia* (1992), pp. 3-15 and R.S.J. Martha, 'Antillianen, Arubanen en het vrije verkeer van werknemers in Europa', *TAR Justicia* (1992), pp. 205-211.

unanimous approval of all the Member States.⁴⁵ The exclusion of those nationals with a close link with the overseas countries and territories is affirmed - in Mortelmans and Temmink's opinion - by Art. 42, para 3 of Regulation 1612/68: according to them, it must be determined which Netherlands nationals are excluded from the benefit of free movement within the Union.⁴⁶

In order to determine the personal scope of the EC Treaty in this respect, Mortelmans and Temmink pay special attention to a publication of Hartley,⁴⁷ who mentions two different possibilities in order to distinguish between nationals who are European citizens and nationals who do not possess this status.⁴⁸ The first possible criterion is the ordinary or habitual residence of the persons involved. An obvious disadvantage of this criterion is that it is easy to change the residence.⁴⁹ If this criterion were to be used, a national of the Netherlands Antilles who wanted to immigrate to Spain would be able to do so merely after a stopover-stay in Amsterdam (perhaps with a short visit to the town authorities in order to enrol in the civil registry).⁵⁰ An additional problem when using this criterion is what to conclude with respect to Netherlands nationals who have a tie with the Antilles or Aruba and who want to move to a Member State of the Union, but who have had their last ordinary or habitual residence in a third country, e.g., Venezuela? Is such a residence in a third country enough to be treated as a European Netherlands national and therefore as a European citizen? And what about Netherlands nationals born in a third country which is geographically, considerably closer to the Netherlands Antilles and Aruba than to the European part of the Kingdom? Are they all European citizens, even if their parents were born on the Antilles or Aruba? All these questions show - in my opinion - that the residence criterion does not work and probably has as its only advantages, the promotion of flights to Amsterdam (preferably by Royal Netherlands Airlines) and an increased booking rate of the hotel rooms in Amsterdam.

A second criterion of Hartley which was cited by Mortelmans and Temmink relates to the grounds for acquisition of the nationality. The origin of a person (in this context, the answer to the question of whether the person involved has a

⁴⁵ Hall, *op. cit.*, note 24, pp. 62, 63.

⁴⁶ This criterion is used by Hall, *op. cit.*, note 24, pp. 28, 29, in order to determine who is a national with special links with an overseas country or territory.

⁴⁷ T.C. Hartley, *EEC Immigration Law*, Oxford: North Holland Publishing Company (1978), pp. 77-80.

⁴⁸ Hall, *op. cit.*, note 24, p. 63.

⁴⁹ Compare Hall, *op. cit.*, note 24, p. 28, with reference to the words of Christopher Greenwood, 'Nationality and the limits of the Free Movement of Persons in Community Law', *Yearbook of European Law* (1987), p. 189: 'those criteria must be found in Community law not least because, with the exception of United Kingdom law, the nationality laws of the Member States do not make sufficient distinctions between nationals who are connected with overseas countries and territories and those connected with the metropolitan territory'.

⁵⁰ Compare Burgers-Vos, *op. cit.*, note 44, p. 9.

closer link with the European part of the Kingdom or with the overseas non-EU territories) should be determined using the origin of the nationality of the person involved. Under this view, the origin of a person could be derived from the birth on the territory of a certain part of the Kingdom (*iure soli*: birth in Europe or in the Caribbean territories) or residence during a certain period in the European or Caribbean part of the Kingdom. It would be possible as well to give relevancy to the origin of the (Netherlands) nationality of the parents (*ius sanguinis*) or the spouse. Hartley favours this second criterion.⁵¹ Mortelmans and Temmink hesitate and argue that using this criterion, the nationals of a third state, e.g., Venezuela, who obtain Netherlands nationality by naturalisation (after a residence of five years in the European part of the Netherlands) would be in a better position than Aruban and Antillean Netherlands nationals living in Europe.⁵² Other arguments against the use of this origin-based criterion can be made. Since 1893, Netherlands nationality law has applied, as the main principle for the attribution of the nationality at birth, the *ius sanguinis* principle.⁵³ Only a very modest part of the population has acquired the nationality at birth based exclusively on a provision which contains some *ius soli* elements.⁵⁴ As a consequence of this minor importance of the *ius soli* principle as ground for acquisition of nationality, it will be difficult in many cases to precisely trace the geographical dimension in the grounds for the acquisition of Netherlands nationality by a certain person. In many cases, genealogical research will be necessary. Clearly, Hartley defended this origin-based criterion while bearing in mind the British nationality legislation, where the geographical element was patently present in the very recent past. For the Kingdom in the Netherlands one must conclude however, that the application of Hartley's criterion would be too complicated.

Mortelmans and Temmink propose that a combination of both of the criteria discussed by Hartley would create a useful criterion: they write that it would be possible for the Netherlands to use the Antillean and Aruban immigration regulations (*Landsverordening Toelating en Uitzetting*) in order to distinguish between Netherlands Overseas Territories Nationals and Netherlands European citizens.⁵⁵ Art. 1 of the Antillean Immigration Regulation identifies the persons to

⁵¹ Hartley, *op. cit.*, note 47, p. 77.

⁵² Hartley, *op. cit.*, note 47, p. 64.

⁵³ Art. 3, para 1 of the Netherlands Nationality Act: '1. A child shall be a Netherlands national if the father or the mother is a Netherlands national at the time of its birth, or is a Netherlands national who dies before its birth.'

⁵⁴ The most important provision is Art. 3, para 3 Netherlands Nationality Act: '3. A child shall be a Netherlands national if it is born to a father or mother who is residing in the Netherlands or the Netherlands Antilles at the time of its birth and who was born of a mother residing in one of these countries.' This is the so-called third-generation rule. The provision of Art. 3, para 3 does not contain a strict *ius soli* regulation. The provision does not demand that the child was born on Netherlands soil, only that the father or mother resides in the Kingdom.

⁵⁵ Hall, *op. cit.*, note 24, p. 64.

whom the Immigration provisions are *not* applicable these are the Netherlands nationals born in the Netherlands Antilles or nationals born on Aruba before 1 January 1986,⁵⁶ if these persons were residing in the Netherlands Antilles on 1 January 1986, as well the children of these nationals. The Antillean (and Aruban) regulation therefore distinguishes between European and Caribbean Netherlands nationals. This distinction could, according to Mortelmans and Temmink, also be used for the determination of Netherlands nationals for Community purposes. Using that distinction, all Netherlands nationals who do not fulfil the conditions of Art. 1 of the Antillean (respectively Aruban) Immigration Regulation would qualify as European Citizens and all those who fulfil the conditions of the Antillean, respectively Aruban Immigration Regulations, do not. According to Mortelmans and Temmink, Antillean and Aruban Netherlands nationals nevertheless should acquire the right of freedom of movement after a residence of five years in the Netherlands.⁵⁷

Several arguments can be used against this proposal of Mortelmans and Temmink. In the first place, the period of residence necessary for the conversion of a non-European Netherlands national into a European citizen is quite arbitrary. Indeed, foreigners can apply for naturalisation after five years of residence in the Netherlands, but in several cases this period is shorter: for married and unmarried partners of Netherlands nationals, and for former nationals or persons who possessed in the past the special colonial citizenship of the Netherlands. It is an unacceptable result that a Netherlands Antillean national would have to fulfil a longer residence requirement than a Surinamese or Indonesian ex-national in order to acquire the status of a European citizen. A second point against the proposal is that the Aruban Immigration Regulation does not apply to the spouses of nationals born on Aruba. The consequence of using the proposed criterion would be, that a Netherlands European Citizen would lose the status of a European Citizen by marriage with an Aruban, whereas a German who would marry an Aruban would keep the status of European citizen. Naturally, the former case would be a violation of international law. And last but not least, it is unacceptable that the authorities of a non-EU territory decide the question of who is a European citizen and who is not.

The unacceptability of the consequences of the proposed criterion can also be illustrated by looking at the regulations, which probably will be accepted, if Aruba or the Netherlands Antilles would gain independence. In that case, it would be necessary to conclude a treaty on the division of nationals between the Netherlands and the new State or States. In light of the poor demographic consequences of a similar treaty concluded between the Netherlands and Surinam in

⁵⁶ On this day, Aruba was separated from the Netherlands Antilles and received a *status aparte* within the Kingdom of the Netherlands as a 'country'.

⁵⁷ The period of five years corresponds with the residence condition of Art. 8 of the Netherlands Nationality Act, which must be fulfilled before making an application for naturalisation.

1975 (which resulted in a considerable part of the population of Surinam moving to the Netherlands in order to avoid the loss of Netherlands nationality), one can expect that in a similar treaty with the Netherlands Antilles or Aruba a system of dual citizenship will probably be created for at least a period of half a century. E.g., one can imagine the following legal construction: every Netherlands national residing in the new State keeps his or her Netherlands nationality as of the day of independence, but acquires as well the nationality of the newly created State. During the next fifty years, Netherlands nationality would still be transferred *iure sanguinis*; after that period, this possibility would expire. Such a regulation would not violate international law and would not cause immigrations flows in the days before the independence. A very surprising consequence from the perspective of European Union law would however, be that the persons involved would suddenly not be living anymore in a non-European territory of a Member State of the Union, but in a third country, and yet would undoubtedly enjoy the rights of a European citizen.

Keeping in mind all these problems, we must conclude that the nationals of Member States who live in non-European territories of these Member State are European citizens in spite of Art. 135 EC Treaty, if the Member State involved makes no distinction between the national with a close connection with the European part of the Member State and those who have a close connection to the Overseas territory.⁵⁸ Everybody who identifies himself or herself as a national of that Member State with a valid identity card or passport⁵⁹ of that Member State must be treated as a European Citizen. The Member State involved may however, lodge an unilateral Declaration excluding nationals with a genuine link with non-European Overseas territories of that State from the scope of European citizenship. Whether authorities of the Member State would need the co-operation of the non-European territories for making such a Declaration is a matter of domestic constitutional law of the Member State involved.⁶⁰

⁵⁸ This view is in conformity with the fact that according the Commission in its draft directive on voting rights for EP elections, the determination of the entitlement to voting rights for individuals from overseas countries and territories is an exclusive competence of the Member State which has particular links to this territories because of its exclusive competence to determine nationality. See: COM (93), 0534 final. See also: C. Closa, 'Citizenship of the Union and Nationality of Member States', *Common Market Law Reports* (1995), p. 511.

⁵⁹ As prescribed by Art. 2 (1) and 6 (a) of Directive 73/148 (establishment and services) and Art. 3 (1) and 4 (3) (a) of Directive 68/360 (workers).

⁶⁰ Compare also the publication of Martha, *op.cit.*, note 44, who, via another argumentation, comes to the same conclusion.

D. SOME LIMITATIONS ON THE POWER TO DETERMINE NATIONALS FOR COMMUNITY PURPOSES

In the preceding paragraph, some problems relating to the determination of the scope of European citizenship were discussed. It has already been concluded that particular unilateral Declarations excluding or including certain groups of persons can be problematic, from the perspective of Community law.

Unilaterally excluding the British Dependant Territories Citizens residing in Gibraltar from the definition of 'British national' for Community purposes would probably violate Art. 227, para. 4 EC Treaty, if the territory of Gibraltar would remain territory of the Community.

Unilaterally including all individuals with Spanish-Latin American citizenship within the scope of European citizenship would probably violate the obligation of solidarity (*Gemeinschaftstreue*) prescribed by Art. 5 EC Treaty.⁶¹

A violation of the obligation of solidarity can also occur if the attempt to include a group of persons within the scope of European citizenship is not made by lodging a unilateral Declaration on the nationality of that Member State, but instead by a special, extra-ordinary grant of the nationality of that Member State to the whole population of a non-EU State or an important part of that population, without previous consultation of the European Commission. For example, if the Netherlands were to suddenly grant to the whole population of Surinam or an important part of that population, the Netherlands nationality, it could be argued, that this would constitute a violation of the obligation of solidarity.⁶² Nevertheless, much depends on the reaction or non-reaction of the other Member States and the Commission. The recent history of nationality law of the United Kingdom provides two examples: during the Falkland Islands war, an Act of Parliament was passed granting British nationality (and therefore, in my opinion, European citizenship) to all British Overseas Citizens living on the Falkland Islands (who were not European citizens before; and perhaps with the exception of those who were at the same time, Argentineans of Italian descent). No protest was made by the European Commission or other Member States. Even more recently, a part of the population of Hong Kong was granted an option right to British nationality: again, no protest was heard.

⁶¹ See Hall, *op. cit.*, note 24, pp. 64-73, who pays attention as well to the procedures, which have to be followed if duties under Art. 5 are violated.

⁶² This example has not been invented at my writing-table. Prime Minister Lubbers of the Netherlands suggested this as a 'political possibility' during a speech given in 1992. An advantage of such a grant of Netherlands nationality would be that Netherlands nationals with ties to Surinam would perhaps more easily re-immigrate to Surinam.

V. LIMITATIONS ON THE PERSPECTIVE OF THE RIGHT OF FREE MOVEMENT OF PERSONS

A. INTRODUCTORY REMARKS

Art. 8, A para. 1 EC Treaty provides that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and in the measures adopted to give it effect. Nevertheless, one should realise that many national rules hinder to some extent, the complete exercise of this right on free movement; in some cases, they even completely prevent the exercise of this right. The national rules on acquisition and loss of nationality can influence the exercise of the right of free movement as well: it therefore can be argued that at least some of these rules violate Community law, or at a minimum, some of these rules must be interpreted and applied in conformity with Community law in order to avoid a conflict therewith.⁶³ In this section, some problematic provisions of the nationality laws of some Member States will be examined from the perspective of a potential hindrance of the exercise of the right of free movement by the persons involved or by close relatives of these persons and therefore from the perspective of a potential violation of Community law.

B. LOSS OF NATIONALITY DUE TO CONTINUOUS RESIDENCE ABROAD

A violation of the right of free movement within the European Union could exist, if a national of a Member State could lose his nationality (and therefore the status of a citizen of the Union) when he lives abroad in another Member State during a certain period of time. The exercise of the right of free movement guaranteed by the EC Treaty in combination with such a regulation would cause the loss of the nationality and therefore - in some cases - the loss of the status of European citizen. In my opinion, such a regulation cannot be accepted by Community law.

1. *The Netherlands*

Let us assume, for example, that the Netherlands would amend the provision of Art. 15, para. c of the Netherlands Nationality Act in the following sense: Netherlands nationality will be lost by any Netherlands national who also possesses another nationality and who lives (after having reached the age of majority) for a continuous period of ten years outside the Netherlands, the Netherlands Antilles or Aruba, other than in the service of the Netherlands or the Netherlands Antil-

⁶³ Compare S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bed-fellows', *Yearbook of European Law* (1992), pp. 353-384, especially p. 378; Hall, *op. cit.*, note 24, p.33.

les or of an international organisation at which the Kingdom is represented, or as the spouse of a person in such service. In some cases, the application of this rule would constitute a violation of Community law. That would be the case if one possessed Netherlands nationality and that of a non-EU country. After having lived for a period of ten years in e.g., Germany, the citizen would lose Netherlands nationality and thus, the status of European citizen. This result is especially unacceptable in cases where the citizen involved is not able to renounce his non-EU nationality, e.g., Venezuela, due to the domestic nationality rules of the non-EU country involved.⁶⁴

It should be emphasised that this author did not invent this amendment of Art. 15, para. c of the Netherlands Nationality Act, but instead, simply paraphrased an amendment proposed in a bill sent by the Netherlands government to the Parliament on 25 February 1993.⁶⁵ But on 16 September 1993, the Netherlands Government modified the proposed new article: no loss of Netherlands nationality occurs if the person involved resides in a Member State, and furthermore, in many cases the loss can be prevented by having a Netherlands passport or a certificate of possession of Netherlands nationality.⁶⁶ The government

⁶⁴ One should realise that a considerable number of persons possess both Netherlands and Venezuelan nationality (the one *iure sanguinis*, the other *iure soli*), partly due to the fact that Venezuela is a neighboring country of the Caribbean part of the Kingdom of the Netherlands, and partly due to the activities of the Shell Oil Company in Venezuela.

⁶⁵ *Voorstel van Rijkswet tot wijziging van de Rijkswet op het Nederlanderschap, wetsontwerp 23 029 (R. 1461)*. The complete text of the proposed new Art. 15 reads:

1. Het Nederlanderschap gaat voor een meerderjarige verloren: a. door het afleggen van een verklaring van afstand; b. indien hij tevens een vreemde nationaliteit bezit en tijdens zijn meerderjarigheid gedurende een ononderbroken periode van tien jaar in het bezit van beide nationaliteiten zijn hoofdverblijf heeft in het buitenland, anders dan in een dienstverband met Nederland, de Nederlandse Antillen of Aruba dan wel met een internationaal orgaan waarin het Koninkrijk is vertegenwoordigd, of als echtgenoot van een persoon in een zodanig dienstverband. 2. Het in het eerste lid, onder b, bepaalde is niet van toepassing op de Nederlander die tijdens zijn meerderjarigheid die vreemde nationaliteit verkrijgt. 3. De in het eerste lid, onder b, bedoelde periode van tien jaar wordt geacht niet te zijn onderbroken indien de betrokkene gedurende een periode korter dan één jaar zijn hoofdverblijf in Nederland, de Nederlandse Antillen of Aruba heeft.

⁶⁶ The new proposed article reads:

1. Het Nederlanderschap gaat voor een meerderjarige verloren: a. door het afleggen van een verklaring van afstand; b. indien hij tevens een vreemde nationaliteit bezit en tijdens zijn meerderjarigheid gedurende een ononderbroken periode van tien jaar in het bezit van beide nationaliteiten zijn hoofdverblijf heeft buiten Nederland, de Nederlandse Antillen en Aruba, en buiten het grondgebied van de lid-staten van de Europese gemeenschap, anders dan in dienstverband met Nederland, de Nederlandse Antillen of Aruba dan wel met enig internationaal orgaan waarin het Koninkrijk is vertegenwoordigd, of als echtgenoot van of als ongehuwde in een duurzame relatie samenlevend met een persoon in een zodanig dienstverband. 2. Het in het eerste lid, onder b, bepaalde is niet van toepassing op de Nederlander die tijdens zijn meerderjarigheid die vreemde nationaliteit verkrijgt. 3. De in het eerste lid onder b bedoelde periode van tien jaar wordt geacht niet te zijn onderbroken indien de betrokkene gedurende een periode korter dan één jaar zijn hoofdverblijf in Nederland, de

justified this modification of the proposed amendment on the ground that the first proposed text could violate the right of free movement within the European Union.⁶⁷ I agree with this view of the Netherlands Government, with the addition that in my opinion, an exception should be made for every Netherlands national residing in a country within the European Economic Area.

Perhaps one can even argue that the corresponding provision, which is in force at the moment, hinders the free exercise of the right of free movement. At this point in time, Art. 15, para. c provides that a person who is an adult shall lose his Netherlands nationality if, after having reached the age of majority, he has his residence for a continuous period of ten years outside the Netherlands, the Netherlands Antilles or Aruba *in the country of his birth and of which he is also a national*, other than in the service of the Netherlands or the Netherlands Antilles or of an international organisation at which the Kingdom is represented, or as the spouse of a person in such service. Because of the fact that loss of Netherlands nationality can only occur if the Netherlands citizen lives 'in the country of his birth and of which he is a the national', the situation in which the Netherlands national suddenly ceases to be a European citizen (if he resides within the European Union) will never occur. Nevertheless, one can observe at least some hindrances to the exercise of the right of free movement, because one can imagine that the Netherlands national hesitates to return to the country of his birth because of the potential future loss of his Netherlands nationality and the rights derived from that nationality.

2. Belgium

Loss of nationality because of a continuous residence abroad exists not only in the nationality legislation of the Netherlands, but also in other EU countries (for example, Belgium). But in my opinion, a technical detail in the corresponding Belgian law prevents the Belgian legislation from violating Community law. The relevant part of Art. 22 of the Belgian Nationality Act reads:

§ 1^{er}. *Perdent la qualité de Belge: ...*

5^o *le Belge né à l'étranger à l'exception des anciennes colonies belges lorsque:*

- a) *il a eu sa résidence principale et continue à l'étranger de dix-huit à vingt-huit ans;*
- b) *il n'exerce à l'étranger aucune fonction conférée par le Gouvernement Belge ou à l'intervention de celui-ci, ou n'y est pas occupé par une société ou une association de droit belge au personnel de laquelle il appartient;*

Nederlandse Antillen of Aruba, dan wel op het grondgebied van een van de lid-staten van de Europese gemeenschap heeft. 4. De in het eerste lid onder b. bedoelde periode wordt gestuit door de verstrekking van een verklaring omtrent het bezit van het Nederlanderschap dan wel van een reisdocument in de zin van de Paspoortwet. Vanaf de dag der verstrekking begint een nieuwe periode te lopen.

⁶⁷ *Memorie van Antwoord*, pp. 8,9.

- c) *il n'a pas déclaré, avant d'atteindre l'âge de vingt-huit ans, vouloir conserver sa nationalité belge; du jour de cette déclaration, un nouveau délai de dix ans prend cours.*

.....

- § 3. *Le § 1^{er}, 5^o et 6^o, ne s'applique pas au Belge qui, par l'effet d'une de ces dispositions, deviendrait apatride.'*

As in the case of the Netherlands, it is possible that a Belgian national could lose his Belgian nationality and therefore European citizenship, while exercising the right of free movement of persons in another Member State of the European Union. But by lodging a Declaration of continuation to the Belgian authorities in due time, the loss of Belgian nationality can be avoided. Of course one can imagine cases in which the person involved simply forgets to lodge a Declaration of continuation. Nevertheless, in such cases I would not conclude that this requirement is a violation of Community law: it is not unacceptable that a citizen has to make such a declaration. Recently, in the *Factortame*⁶⁸ decision, the Court of Justice stressed (in the context of the obligation to pay compensation for damages caused by a violation of Community law) that an injured person must show reasonable diligence in order to avoid loss or damage or limit its extent and that a person must make use of all legal remedies available to him.⁶⁹ Keeping this principle in mind, one could argue in the context of nationality law that one cannot complain about a violation of Community law if one could have avoided all damages by making a simple declaration.

C. (NON)ACQUISITION OF NATIONALITY AT BIRTH

Most Member States of the European Union attribute their nationality to children of their nationals irrespective of whether these children are born in the country or on foreign territory and irrespective of whether the parents were born abroad. Two Member States have a different approach: the United Kingdom and Belgium. Thus, the regulations of these Member States must be examined in more detail.

1. *The United Kingdom*

Section 1, subsection 1 of the British Nationality Act (BNA) of 1981 provides that a person born in the United Kingdom shall be a British citizen if, at the time of his birth, his father or mother is (a) a British citizen; or (b) settled in the United Kingdom. Section 2 of the BNA states *inter alia* that a person born outside the United Kingdom shall be a British citizen if, at the time of his birth, his father or mother is a British citizen and:

⁶⁸ Decision 5 March 1996.

⁶⁹ Point 84 of the *Factortame* decision.

- (a) has obtained that citizenship other than by descent; or
- (b) is serving outside the United Kingdom in British service, the recruitment for that service having taken place in the United Kingdom; or
- (c) is serving outside the United Kingdom in service under a Community institution, the recruitment for that service having taken place in a country which at the time of the recruitment was a Member State.

Section 3 of the BNA applies to the nationality status of - to put it briefly - the second generation born abroad. According to subsection 2 of section 3, a person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made within the period of twelve months from the date of the birth, to be registered as a British citizen if the requirements specified in subsection (3) or, in the case of a person born stateless, the requirements specified in paragraphs (a) and (b) of that subsection, are fulfilled in the case of either that person's father or his mother ('the parent in question'). These requirements are that:

- (a) the parent in question was a British citizen by descent at the time of the birth; and
- (b) the father or mother of the parent in question
 - (i) was a British citizen otherwise than by descent at the time of the birth of the parent in question; or
 - (ii) became a British citizen otherwise than by descent at commencement, or would have become such a citizen otherwise than by descent at commencement, but for his or her death; and
- (c) as regards some period of three years ending with a date not later than the date of the birth:
 - (i) the parent in question was in the United Kingdom at the beginning of that period; and
 - (ii) the number of days on which the parent in question was absent from the United Kingdom in that period does not exceed 270.

Subsection 4 allows for the possibility that the Secretary of State allows a later registration than within the twelve months immediately after the birth of the child by providing that 'if in the special circumstances of any particular case the Secretary of State thinks fit, he may treat subsection 2 as if the reference to twelve months were a reference to six years'.

If a person is born abroad as a child of a British parent without acquiring British citizenship, he may acquire a right to registration if the conditions of subsection 5 are fulfilled:

- (5) A person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made while he is a minor, to be registered as such a citizen if the following requirements are satisfied, namely-
 - (a) that at the time of that person's birth his father or mother was a British citizen by descent; and
 - (b) subject to subsection (6), that that person and his father and mother were in the United Kingdom at the beginning of the period of three years ending

- with the date of the application and that, in the case of each of them, the number of days on which the person in question was absent from the United Kingdom in that period does not exceed 270; and
- (c) subject to subsection (6), that the consent of his father and mother to the registration has been signified in the prescribed manner.⁷⁰

As one can see, the entire regulation is extremely complicated. The aim of the described provisions is obviously to avoid the situation in which someone acquires British nationality without having any genuine link with the United Kingdom. The goal of these provisions is the same as that of Art. 15, para. c of the Netherlands Nationality Act, which was discussed above. It is not difficult to imagine cases in which the (grand)children of British nationals who reside abroad in another Member State enjoy their right to free movement guaranteed by the EC Treaty and yet do not obtain British nationality at birth and are not entitled to registration. The consequence is that children of European citizens working within the European Union under certain circumstances will not receive a right to European citizenship.⁷¹ In my opinion, this consequence is unacceptable from the perspective of the aims of the EC Treaty. The British legislation however, opens a possibility to escape from this first-sight conclusion, because Section 3, subsection 1 of the BNA states:

If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.

In conformity with the aims of the EC Treaty, the Secretary of State should use this opportunity of registration, if the minor involved is the child of a British parent who is exercising his right to free movement as guaranteed by Art. 8A of the Treaty. If the Secretary of State does not do so, he will be violating Community law.⁷²

⁷⁰ Subsection 6 reads: In the case of an application under subsection (5) for the registration of a person as a British citizen— (a) if his father or mother died, or their marriage was terminated, on or before the date of the application, or his father and mother were legally separated on that date, the references to his father and mother in paragraph (b) of that subsection shall be read either as references to his father or as references to his mother; (b) if his father or mother died on or before that date, the reference to his father and mother in paragraph (c) of that subsection shall be read as a reference to either of them; and (c) if he was born illegitimate, all those references shall be read as references to his mother.

⁷¹ Except in cases in which the law of the country of birth confers to them the nationality of the Member State involved.

⁷² With regard to the British rules regarding acquisition of citizenship by descent, compare the interesting opinion of Andrew Evans' chapter, 'Union Citizenship and the Constitutionalization of Equality in EU Law'. He points out that British citizens who use their right of free movement under circumstances, only pass on to their children a 'second class' citizenship. This could be classified as exposing them to discrimination. In the

2. Belgium

Similar complications exist in Belgium. According to Art. 8 of the Belgian Nationality Act, the following persons acquire Belgian nationality:

- a) every child of a Belgian parent born in Belgium; or
- b) the child of a Belgian parent born abroad, if one of three conditions is fulfilled:
 - 1) the parent was born in Belgium or in territories under Belgian administration; or
 - 2) within five years after the birth of the child the Belgian parent registers the child as a Belgian national; or
 - 3) the child is otherwise born stateless or loses his (other) nationality before his eighteenth birthday.⁷³

Reading these conditions, one can imagine cases in which a child of Belgian parents does not acquire Belgian nationality (and therefore European citizenship) whereas the parents are exercising their European citizenship right in another Member State. However, the parents are always able to register their child as a Belgian citizen and that fact distinguishes the Belgian legislation from the British provisions. There is perhaps some nuisance for the parents involved, but they are able to avoid all nationality disadvantages for their children by making a declaration for Belgian citizenship in due time (within five years after the birth of the child). Again, keeping in mind again the ruling of the European Court of Justice in the *Factortame* case, where the Court stressed that one has the obligation to avoid damages if possible, I conclude that Belgian parents cannot complain about a violation of Community law by the Belgian legislation on the acquisition of nationality at birth, if they themselves 'forget' to lodge a Declaration to the Belgian authorities.

D. PROBLEMS CAUSED BY (NON)ACCESS OF NON-EU SPOUSES OF EUROPEAN CITIZENS

If a European citizen is married to a non-EU citizen, the exercise of the right of free movement by the European citizen may be influenced by the difficulties

opinion of Evans, the application of such rules is 'problematic' where these rules - although reflecting national traditions - are employed as an instrument of immigration control and have consequences incompatible with free movement rights. Cf. as well Hall, *op. cit.*, note 24, pp. 32, 33.

⁷³ Art. 8, para 1 reads: 1er. Sont Belges: 1. L'enfant né en Belgique d'un auteur belge, 2. L'enfant né à l'étranger: a) d'un auteur belge né en Belgique ou dans des territoires soumis à la souveraineté belge ou confiés à l'administration de la Belgique; b) d'un auteur belge ayant fait dans un délai de cinq ans à dater de la naissance une déclaration réclamant, pour son enfant, l'attribution de la nationalité belge; c) d'un auteur belge, à condition que l'enfant ne possède pas, ou ne conserve pas jusqu'à l'âge de dix-huit ans ou son émancipation avant cet âge, une autre nationalité.

which the non-EU spouse will encounter regarding the acquisition of European citizenship, after moving to another Member State. Of course, all Member States allow the application for naturalisation after a certain period of residence. The required period of residence however varies among the Member States. Therefore, it is not difficult to imagine that a non-EU spouse of a European citizen would suffer disadvantages in fulfilling the residence requirement in a Member State, if the EU-spouse decides to enjoy the right of free movement to another Member State and expects that the non-EU spouse moves with him. This difficulty is particularly striking if the EU-spouse accepts work again in another Member State every four or five years, which is not uncommon for employees of certain multinationals. Although the spouses of some EU nationals may have lived for many years (even a decade) in the European Union, they will never be able to acquire European citizenship because their EU-spouses' Member States of origin require residence in that Member State in order to become naturalised. This proposition may be properly illustrated with some examples.

1. The United Kingdom

Section 6, subsection 2 of the British Nationality Act provides:

If, on an application for naturalisation as a British citizen made by a person of full age and capacity who on the date of the application is married to a British citizen, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule I for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen.

Schedule I contains following provisions:

Naturalisation as a British citizen under section 6(2)

3. Subject to paragraph 4, the requirements for naturalisation as a British citizen under section 6(2) are, in the case of any person who applies for it—
 - (a) that he was in the United Kingdom at the beginning of the period of three years ending with the date of the application, and that the number of days on which he was absent from the United Kingdom in that period does not exceed 270; and
 - (b) that the number of days on which he was absent from the United Kingdom in the period of twelve months so ending does not exceed 90; and
 - (c) that on the date of the application he was not subject under the immigration laws to any restriction on the period for which he might remain in the United Kingdom; and
 - (d) that he was not at any time in the period of three years ending with the date of the application in the United Kingdom in breach of the immigration laws; and

(e) the requirement specified in paragraph 1(1)(b).⁷⁴

The Secretary of State may make some exceptions to the conditions of Paragraph 3, based on Paragraph 4,⁷⁵ in relation to paragraph 2.⁷⁶ If this author understands it correctly, the Secretary of State may take any or all of the following actions:

- (a) treat the applicant as fulfilling the requirement specified in paragraph 3(a) or paragraph 3(b), or both, although the number of days on which the applicant was absent from the United Kingdom during the period there-mentioned exceeds the number of days specified;
- (b) treat the applicant as having been present in the United Kingdom for the whole or any part of any period during which he would otherwise have been treated under paragraph 9(1) as having been absent;
- (c) treat the applicant as fulfilling the requirement specified in paragraph 3(d), although the applicant was in the United Kingdom in breach of the immigration laws during the period there-mentioned; and/or
- (d) waive the need to fulfil any or all of the requirements specified in paragraphs 3(a) and (b) if, on the date of the application, the person to whom the applicant is married is in a service to which section 2(1)(b) applies, that person's recruitment for the service having taken place in the United Kingdom.

The Secretary of State can probably naturalise the foreign spouse of a British national living in another Member State, if he uses the possibilities created by the

⁷⁴ Paragraph 1(1)(b): 'that he is of good character'.

⁷⁵ Para. 4 reads: Paragraph 2 shall apply in relation to paragraph 3 with the following modifications, namely—(a) the reference to the purposes of paragraph 1 shall be read as a reference to the purposes of paragraph 3; (b) the references to paragraphs 1(2)(a), 1(2)(b) and 1(2)(d) shall be read as references to paragraphs 3(a), 3(b) and 3(d) respectively; (c) paragraph 2(c) and (e) shall be omitted; and (d) after paragraph (e) there shall be added—(f) waive the need to fulfil all or any of the requirements specified in paragraph 3(a) and (b) if on the date of the application the person to whom the applicant is married is serving in service to which section 2(1)(b) applies, that person's recruitment for that service having taken place in the United Kingdom.

⁷⁶ Para. 2 reads: If in the special circumstances of any particular case the Secretary of State thinks fit, he may for the purposes of paragraph 1 do all or any of the following things, namely—(a) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(a) or paragraph 1(2)(b), or both, although the number of days on which he was absent from the United Kingdom in the period there mentioned exceeds the number there mentioned; (b) treat the applicant as having been in the United Kingdom for the whole or any part of any period during which he would otherwise fall to be treated under paragraph 9(1) as having been absent; (c) disregard any such restriction as is mentioned in paragraph 1(2)(c), not being a restriction to which the applicant was subject on the date of the application; (d) treat the applicant as fulfilling the requirement specified in paragraph 1(2)(d) although he was in the United Kingdom in breach of the immigration laws in the period there mentioned; (e) waive the need to fulfil the requirement specified in paragraph 1(1)(c) if he considers that because of the applicant's age or physical or mental condition it would be unreasonable to expect him to fulfil it.

above-mentioned sections. In my opinion, the Secretary of State should do so in order to prevent the exercise of the rights guaranteed by the EC Treaty from being hindered by the disadvantages which would be suffered with respect to the access to European citizenship by the non-EU spouse.

2. The Netherlands

In the Netherlands, the difficulty for the non-EU spouse of a national living in other Member States is more hidden. Art. 8, para. 2 of the Netherlands Nationality Act states that in order to be eligible for the grant of Netherlands nationality by naturalisation, no residence requirement exists for an applicant who has been married to a Netherlands national for at least three years. Nevertheless, these applicants must fulfil the conditions of Art. 1, para. 1 d): they must be integrated in the society of the Netherlands and must have a reasonable command of the Netherlands language. It will be very difficult for the foreign spouses involved to fulfil these conditions while living abroad in other Member States of the European Union. Again, I conclude that this is very problematic from the perspective of the right of free movement within the European Union.

3. Belgium

The Belgian nationality legislation causes comparable problems. Art. 16, para. 2 of the Belgian Nationality Act states the conditions for acquisition of Belgian nationality by the foreign spouse of a Belgian national: the foreigner can make a Declaration of option for Belgian nationality, if they have lived together for at least six months in Belgium.⁷⁷ The Declaration of option can be refused,

si un empêchement résulte de faits personnels graves qu'il doit préciser dans les motifs de sa décision, ou s'il y a des raisons, qu'il doit également préciser, d'estimer que la volonté d'intégration du déclarant est insuffisante.

According to the last sentence of Art. 16, para. 2, the foreign spouse can be deemed to fulfil the residence requirement in Belgium while living together with a Belgian national abroad, if real ties with Belgium are developed. This part of the provision reads as follows:

⁷⁷ Art. 16 § 2 reads as follows: *l'étranger qui contracte mariage avec un conjoint de nationalité belge ou dont le conjoint acquiert la nationalité belge au cours du mariage, peut, si les époux ont résidé ensemble en Belgique pendant au moins six mois et tant que dure la vie commune en Belgique, acquérir la nationalité belge par déclaration faite et agréée conformément à l'article 15. Le tribunal peut surseoir à statuer, pendant un temps qu'il détermine mais qui ne peut excéder deux ans, si pour des motifs propres à l'espèce, il estime que la durée de la résidence commune en Belgique est insuffisante pour lui permettre d'apprécier la volonté d'intégration du déclarant. Le refus de l'agrément ne rend pas irrecevable une déclaration ultérieure.*

Peut être assimilée à la vie commune en Belgique, la vie commune en pays étranger lorsque le déclarant prouve qu'il a acquis des attaches véritables avec la Belgique.

With regard to this provision, we must likewise conclude that the situation in which the non-EU spouse of a Belgian national lives in another Member State, exercising his right to freedom of movement, is not taken into account.

E. LOSS OF NATIONALITY BECAUSE OF VOLUNTARY SERVICE OF A FOREIGN STATE

A final example of nationality provisions which can conflict with Community law can be illustrated by Art. 23-8 of the French Civil Code:

Perd la nationalité française le Français qui, occupant un emploi dans une armée ou un service public étranger ou dans une organisation internationale dont la France ne fait pas partie ou plus généralement leur apportant son concours, n'a pas résigné son emploi ou cessé son concours nonobstant l'injonction qui lui en aura été faite par le Gouvernement.

L'intéressé sera, par décret en Conseil d'État, déclaré avoir perdu la nationalité française si, dans le délai fixé par l'injonction, délai qui ne peut être inférieur à quinze jours et supérieur à deux mois, il n'a pas mis fin à son activité.

Lorsque l'avis du Conseil d'État est défavorable, la mesure prévue à l'alinéa précédent ne peut être prise que par décret en conseil des ministres.⁷⁸

If the French authorities applied this provision to a national who is working in the service of another Member State, that would constitute a violation of Community law. The application of this provision is thus not compatible with the goals of the EC Treaty.

VI. CONCLUDING REMARKS

Although Declaration Number 2 on the nationality of Member States of the Treaty of Maastricht (as well as some other Declarations) emphasise the exclusive autonomy of Member States in the determination of their nationality for Community purposes, I have argued in this chapter that this autonomy is limited. In the first place, a certain unilateral declaration of a Member State may conflict with a provision of the Treaty regarding the personal scope of the Treaty (e.g., exclusion of the Gibraltarians) or with the obligation of solidarity (e.g., conferral of Netherlands nationality on all nationals of Surinam). Furthermore, we must realise that several provisions regarding the acquisition and loss of the nationality of a Member State frustrate the exercise of the right of free movement within the Union. Only a few examples of such rules have been given in this chapter, but

⁷⁸ This provision corresponds with Art. 96 of the previous *Code de la nationalité française*.

those examples are already enough in order to conclude, from the perspective of the ruling of the European Court of Justice in the *Micheletti* case, that the nationality legislation of the Member States can violate Community law.